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No. 03-1670

IN THE

Supreme Court of the United States

WILLIAM THURSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether applying the PROTECT Act to a case pending on appeal on the date of enactment contravenes statutory construction, retroactivity, and *ex post facto* doctrines.

2. Whether *de novo* review to determine whether a departure is "justified by the facts of the case" (a) is limited to consideration of extra-record sources that the district court is entitled to consider, and (b) requires affording weight to the district court's experience, expertise, and unique vantage point in sentencing.

3. Whether a district court has discretion to depart from the applicable guideline range based on a disparity between the sentences of similarly situated co-defendants, when otherwise a defendant would be prejudiced by prosecutorial manipulation of the guidelines, or punished for exercising the constitutional right to trial.

Amici will address only the third question in their brief.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF")[1] is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and filing *amicus curiae* briefs in this and other federal courts, promoting a limited and accountable government and opposing abusive civil and criminal enforcement actions by regulatory agencies and the Department of Justice.

Since the U.S. Sentencing Commission's establishment over 17 years ago, WLF has submitted comments to and has testified before the Commission on several occasions regarding various substantive issues. WLF has been particularly critical of the Guidelines and their application where they produce excessive prison sentences, particularly with respect to minor environmental regulatory infractions, which are better remedied by administrative and civil enforcement rather than by the heavy hand of criminal prosecution.[2]

WLF has also urged the Commission and its advisory committees to operate in a transparent manner when formulating Commission policy and guidelines and

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[1] Pursuant to S. Ct. R. 37.6, WLF hereby affirms that no counsel for either party authored any part of this brief, and that no person or entity other than WLF and its counsel provided financial support for preparation or submission of this brief. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

[2] *See, e.g., McNab v. United States*, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 129 S.Ct. 1406 (2004) (97-month sentences imposed for importing lobster tails in plastic bags instead of cardboard boxes). *See also* Tony Mauro, *"Lawyers Seeing Red Over Lobster Case,"* LEGAL TIMES (Feb. 16, 2004).

has taken the Commission to task and to court for failing to do so. *See Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1993); *Washington Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996).

WLF has also opposed the growing and disturbing trend by the Justice Department to prosecute corporate employees and officers under the so-called "responsible corporate officer" doctrine that impermissibly allows the *mens rea* requirement to be diluted or ignored altogether. *See, e.g., Hansen v. United States*, 262 F.3d 1217 (11th Cir. 2001), *cert. denied*, 535 U.S. 1111 (2002) (father and son sentenced to prison under the Guidelines for nine *years* and four *years* respectively for minor environmental infraction).

The Allied Educational Foundation (AEF) is a non-profit public policy organization based in Englewood, New Jersey. Founded in 1964, AEF promotes diverse areas of study in public policy issues and has appeared as amicus curiae along with WLF in numerous cases.

Amici believe that the court of appeals decision in this case prohibiting the trial court from departing from the Guidelines in order to correct unwarranted sentencing disparities between co-defendants was wrongly decided, conflicts with the decisions of other circuits, and undermines the integrity of the criminal justice system and the public's respect of the judiciary.

Accordingly, this Court should grant review and reverse the judgment below.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt the Statement of the Case as presented by the Petitioner. Pet. 2-7. In brief, Thurston and three co-defendants, who were former executives of Damon Clinical Laboratories, were indicted on one count of conspiracy for defrauding the government. 18 U.S.C. § 371. The government alleged that the laboratory had charged the Medicare program for certain blood tests which, while performed by the laboratory, were deemed to be medically unnecessary in most cases.

The government offered a plea deal to Joseph Isola that essentially allowed him to plead nolo contendere and to receive a probationary sentence. He did not agree to cooperate with the government in its further investigation and prosecution of the case. The district court sentenced Isola to three years probation and imposed a $100 assessment.

The government offered a similar plea deal for Thurston. However, believing he was innocent, he rejected the deal and exercised his constitutional right to stand trial. A jury found him guilty of one count of conspiracy as charged. Although the prosecutors argued for a guideline sentence of 78 to 97 months (capped by the statutory maximum of five years for conspiracy) based on the "intended loss" to the Medicare program, the district court departed downward for two reasons: Thurston's extensive charitable works and the gross disparity between the probation imposed on Isola, whom the court considered more culpable, and the five year sentence sought by the prosecutors for Thurston. The trial court then imposed a three-month prison term and 24 months' supervised release

to achieve uniformity and proportionality in sentencing.

The government appealed the sentence, and in the interim, Congress enacted -- after Thurston completed his term of imprisonment and home detention -- the so-called PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, otherwise known as the Feeney Amendment. The PROTECT Act significantly altered the sentencing and review process, including, *inter alia*, providing courts of appeals with *de novo* review authority when reviewing departure decisions by trial courts instead of the due deference standard.

Using this newly minted authority, the court of appeals rejected the district court's departure decision and remanded the case to the district court with instructions to impose the statutory maximum of five years imprisonment. The trial judge, finding that the appellate review process made him "superfluous," recused himself from the case rather than be complicit with carrying out such a miscarriage of justice. Pet. 5.

REASONS FOR GRANTING THE PETITION

WHETHER A DISTRICT COURT HAS DISCRETION TO DEPART FROM THE GUIDELINES BECAUSE OF GROSS DISPARITIES BETWEEN THE SENTENCES OF SIMILARLY SITUATED CO-DEFENDANTS IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT

This case epitomizes much of what is fundamentally wrong with the misnamed Sentencing Guidelines. Rather than "guiding" the discretion of the sentencing authority, the Guidelines effectively dictate that draconian sentences be

imposed, regardless of the inherent unreasonableness of the sentence either standing alone or when compared with disparate sentences imposed on similarly situation co-defendants.

The stark facts in this case present the Court with a perfect opportunity to clarify this important area of the law and to let district courts know that they need not be unthinking automatons when they carry out what is perhaps the most important judicial duty that society has entrusted them with: dispensing justice that entails depriving citizens of their liberty.

A. Courts Should Be Able to Depart from Guideline Sentences That Are Irrational

In this case, Thurston was indicted, elected to stand trial, and was found guilty of one count of conspiracy under 18 U.S.C. § 371. Congress provided that the maximum sentence for that crime should be no longer than five years in prison. Yet the Guidelines dictated that the prison sentence for Thurston -- who had no prior record, and thus, had the lowest possible category offender score -- should be 78 to 97 months in prison. Pet. 3.

Applying the "wisdom" embodied in the Guidelines from the Sentencing Commission, the guideline sentence for Thurston was approximately 30 to 60 percent *longer* than what Congress intended should be meted out to the *worst* offender for the *worst* possible case of conspiracy. Of course, no court could impose a guideline sentence that exceeds the statutory maximum; accordingly, the sentence in this case had to be capped at five years or 60 months, the statutory maximum, which the court of appeals dutifully, but wrongfully, ordered the district court to impose in this

case. In short, the statutory *maximum* sentence that *could* be imposed, became the mandatory *minimum* sentence that *had* to be imposed under court of appeals' inflexible application of the deeply flawed Guidelines. Mandatory minimums are now statutory maximums.[3]

The fact that a first offender's sentence computed under the Guidelines greatly exceeds the statutory maximum -- a disturbing phenomenon that is all too often repeated in other cases -- is proof enough of the irrationality of the guideline scheme. But, the irrationality of the Guidelines is further magnified in this and other guideline cases when one takes into account that the sentences imposed under the Guidelines are determinate ones; parole has been abolished by the Sentencing Reform Act.

Prior to the promulgation of the Sentencing Guidelines in 1987, the normal practice was that defendants sentenced to prison for more than one year were generally eligible for parole after serving only one-third of the sentence imposed. 18 U.S.C. § 4205(a)(1976)(repealed 1984). Thus, under the pre-guideline system, if an offender were sentenced to prison for the statutory maximum of five years for conspiracy, a rare event indeed, that defendant could be eligible for parole. Likely candidates for parole included first-time offenders for non-violent regulatory

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[3] Indeed, before the establishment of the Guidelines, sentencing courts in multiple count cases would often order the sentences to be served *concurrently* for related counts. Now, it is not unusual for courts to make all or a portion of the related second count to run *consecutively* in order to "stack" the sentences to meet the arbitrary and excessive sentence dictated by the Guidelines in a particular case.

offenses.[4]

Thus, just like when comparing the prices of goods today with the prices paid 20 years ago, one must adjust for inflation to determine the "real" dollar cost. So too, in the post-Guideline sentencing scheme, a determinate sentence today of 60 months or five years may actually represent, in real incarceration terms, a staggering pre-guideline prison sentence of up to three times that amount, namely 180 months, or *15 years*.

Congress mandated in 18 U.S.C. § 3553(a) that the sentencing court "*shall* impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes [of

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[4] Indeed, for those convicted of certain environmental violations and sentenced to prison in the pre-Guideline era, they would have been eligible for parole after serving only 0 to 10 months of their sentence. *See* 28 C.F.R. 2.20, Chapter Eleven, Subchap. H -- Environmental Offenses, 1172(d). Yet the Guidelines are particularly harsh on those who commit environmental infractions. *See, e.g.*, *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 129 S.Ct. 1406 (2004). In *McNab*, licensed seafood dealers were sentenced to draconian 97-month prison terms under the Lacey Act for importing frozen lobster tails from Honduras because the shipments, which were routinely cleared by Customs and the Food and Drug Administration officials, were transported in clear plastic bags rather than in cardboard boxes, allegedly in violation of an obscure Honduran packing regulation, even though the Republic of Honduras asserted the regulation was invalid. Because of the gross value of the shipments (rather than the meager profits for the importers), the Guidelines called for an arbitrary sentencing range of 97-121 months; the best the court thought it could do under the circumstances was to impose a sentence at the lower end of the range. For an excellent critique of the Guidelines for environmental offenses, see B. Sharp & L. Shen, *The (Mis)Application of Sentencing Guidelines To Environmental Crimes*, BNA Toxics L. Rpt'r 189 (July 11, 1990).

punishment] set forth in paragraph (2) of this subsection," *e.g.*, "respect for the law," "just punishment," and "deterrence." § 3553(a)(2) (emphasis added). The fundamental principle of this congressional directive is conservation of punishment, an important hallmark of a democratic society that does not inflict arbitrary, unnecessary, or gratuitous punishment on its citizens.[5]

Section 3553(a) does not require that the sentence "comply" with the sentencing guidelines specified in §

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[5] *Amici* realize that the Sentencing Commission was not locked into pre-guideline practice where probation had been often imposed for certain white-collar crimes. But according to one of the original Sentencing Commissioners:

> [T]he Commission deliberately chose, except in the least serious cases of these white-collar crimes (level '6' or less), to require some *minimum form of confinement of one to six months*--either intermittent confinement, community confinement, or imprisonment. The Commission took this course for two reasons. First, the Commission considered present sentencing practices, where white-collar criminals receive probation more often than other offenders who committed crimes of comparable severity, to be unfair. Second, the Commission believed that *a short but definite period* of confinement might deter future crime more effectively than sentences with no confinement condition.

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 20-21 (1988) (footnotes omitted). Remarkably, the three-month prison sentence imposed by the district court on the Petitioner in this case falls squarely within the range contemplated by then-Commissioner Breyer; unfortunately, however, applying the Guidelines in this case resulted in a sentence *exceeding* the statutory maximum of five *years*.

3553(a)(4), but only directs the court to "consider" the Guidelines. Thus, under subsection (a), the Guidelines appear to be truly guidelines which the court should consider, not inflexible mandates to be blindly followed.

However, the very next subsection, 18 U.S.C. § 3553(b), states that the court "shall impose a sentence of the kind, and within the range" specified by the Guidelines. The "guidelines" of subsection (a) are effectively transformed into the inflexible rules of subsection (b). And, depending upon the particular sentence generated by the Guidelines, the sentence may run afoul of the conflicting mandate of subsection (a) and its conservation of punishment ("sufficient, but not greater than necessary") standard.

Such excessive sentences (such as the 97-month prison sentence imposed in *McNab* for the regulatory offense of importing frozen lobster tails in plastic bags instead of cardboard boxes, see note 2, *supra*) suggest that the particular guideline provisions may have been arbitrarily or capriciously drafted by the Commission, and that applying them would contravene the court's sentencing duties under § 3553(a). In such a situation, the arbitrary guideline can be, and should be, disregarded by the sentencing court, just as other arbitrary agency regulations have been found invalid.[6]

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[6] In *United States v. Lee*, 887 F.2d 888 (8th Cir. 1989), for example, the court of appeals unanimously struck down the applicable guideline in that case, 18 U.S.C.S. Appx § 2J1.6, and remanded the case to the district court for resentencing as if the guideline did not exist because the guideline was "not sufficiently reasonable and violate[d] the statutory mandate given to the Sentencing Commission" by producing unreasonably lengthy sentences. *Id.* at 892. Comparing the Sentencing Commission to any other federal regulatory agency, the

Notably, § 3553(b) expressly allows the court to depart from the guideline sentence if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described." *Id.* In the instant case, the district court justified its departure in part because the gross disparity between the sentences for the two co-defendants (probation versus five years) ran counter to Congress' direction that sentencing courts are also to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." § 3553(a)(6).

However, the court of appeals rejected the district court's downward departure on the basis of gross disparities in sentencing, stating that such departures were precluded by circuit precedent in *United States v. Wogan*, 938 F.2d 11446 (1st Cir. 1991). Pet. App. 54a-55a. According to the court of appeals, "guidelines bind us and they bind the district court. The downward departure based on disparity in sentences among co-defendants was impermissible." Pet. App. 55a. In short, the First Circuit's rule is that when faced with competing sentencing mandates by Congress, the courts are to blindly follow the mechanistic rule of applying the oxymoronic Guidelines under § 3553(b), even though to do so would violate the court's mandate under § 3553(a) and frustrate one of Congress' primary purpose for having

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standard of review of its regulations (guidelines) is whether they are "sufficiently reasonable" in light of the congressional directive given to the Sentencing Commission. *Id.* at 890 (citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981)).

guidelines: to eliminate disparities in sentences.

Amici submit that not only was *Wogan* wrongly decided, but the decision also conflicts with decisions of other circuits which recognize the authority of sentencing courts to depart from the Guidelines because of sentencing disparities, including disparities generated due to abuse of prosecutorial discretion.[7] Review is particularly warranted in this area of federal law because uniform application of sentencing by courts across the country is the raison d'etre' of the Guidelines, whereas with respect to other substantive areas of federal law, differing interpretations by the circuits of the federal statute in question may be more tolerable.

B. Courts Should Be Able to Depart from Guideline Sentences That Produce Gross Disparities in Sentences, Particularly Between Co-Defendants

While the draconian sentences regularly imposed under the diktats of the Guidelines are bad enough, the gross disparity of the sentences between Petitioner (five years imprisonment) and his more culpable co-defendant Joseph Isola (probation) make it abundantly clear that departures in such cases are not only warranted, but as previously noted, also further Congressional intent and the primary purpose of the Guidelines, namely, to *reduce* disparity in sentencing.

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[7] *See* Pet. 22-26 (citing, *inter alia*, *United States v. Wright*, 211 F.3d 233 (5th Cir. 2000); *United States v. Caperna*, 251 F.3d 827 (9th Cir. 2001); *United States v. Walls*, 293 F.3d 959 (6th Cir. 2002); *United States v. McMutuary*, 217 F.3d 477 (7th Cir. 2000)).

As one commentator aptly noted:

> Of all the problems that inspired Congress to establish guidelines, none was as urgent as inconsistency in sentencing. 18 U.S.C. 3553(a) lists "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" as one of the primary sentencing considerations. The guidelines reflect this commitment in the opening policy statement. The goal of uniformity is no less pressing simply because two defendants happen to be joined in the same case. In fact, similarly situated defendants accused of the same crime so clearly deserve similar punishments that they present test cases for the legitimacy of the guidelines.

Eric Lotke, *Sentencing Disparity Among Co-Defendants: The Equalization Debate*, 6 Fed. Set. R. 116 (1993) *available at* 1993 WL 561438 (footnote omitted). As the Sentencing Commission itself reminds us:

> *The guidelines seek fairness*, which is the establishment of sanctions proportionate to the severity of the crime and *the avoidance of unwarranted disparity, by setting similar penalties for similarly situated offenders*.
>
> * * * *
>
> Disparity in sentencing has long been a concern for Congress, the criminal justice community, and the public.

U.S. Sentencing Comm'n, 2002 ANNUAL REPORT 1 (emphasis added).

The First Circuit's rationale for rejecting departures based on disparities is its mistaken view expressed in *United States v Wogan*, *supra*, that because the Guidelines were intended to eliminate "*nationwide* disparities," intra-case disparities can and must be tolerated. 938 F.2d at 1449. This view leads to the nonsensical conclusion that if intra-case disparities are widespread enough, they should be tolerated because at least the sentences are *uniformly* bad.

C. Sentencing Disparities Which Are Aggravated by Prosecutorial Misconduct Especially Warrant Downward Departures

As this case graphically illustrates, the gross disparities between the sentence imposed on Petitioner and his co-defendant came about as a result of the common practice of charge bargaining and fact bargaining that the district court found particularly odious. As described further herein, under charge bargaining, prosecutors will offer to drop charges if the defendant pleads guilty; under fact bargaining, prosecutors agree to refrain from presenting aggravating facts to the court in return for guilty pleas, thus ensuring lighter sentences. Both practices have been sharply criticized.

As noted, Isola pled nolo contendere to one count of conspiracy and received probation, a sentence which was not opposed by the government. Thurston exercised his constitutional right to go to trial and was found guilty. The short prison sentence imposed on Thurston was greater than the purely probationary sentence for Isola that was agreeable to the government, even though the court stated that Isola was more culpable. Yet, government prosecutors urged the court to impose a guideline sentence of 78 to 97 months (capped by the statutory maximum of 60 months).

Unfortunately, the abusive prosecutorial practices that produced the disparities in this case are all too common in our system of justice. As one commentator noted:

> The problem of unjustified disparity is not illusory. Commentators have identified numerous sources of disparity in Guidelines sentencing, such as inconsistent charging practices, conflicting judicial interpretations of key provisions, prosecutorial and judicial circumvention of the Guidelines, an undue emphasis on drug and monetary quantities, and pre-arrest sentence manipulation by police officers and government investigators. Moreover, judges appear to have grown frustrated by the Guidelines' inability to resolve these problems. Under these circumstances, there can be little doubt that the problem of unwarranted disparity continues to persist in a substantial number of cases. Thus, a blanket rule against departures to remedy this problem appears, on its face, to be inappropriate.

James A. McLaughlin, *Reducing Unjustified Sentencing Disparity*, 107 Yale L.J. 2345, 2347 (1998) (footnotes omitted).[8] Indeed, downward departures would not only further Congress' intent of reducing disparities, but also would bring transparency into the sentencing process which will promote public confidence in the integrity of the judicial system.

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[8] See also Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale. L.J. 1681, 1723-24 (1992) (observing that differing prosecutorial practices are a source of hidden and unreviewable disparity).

> Permitting judges to depart on the basis of unjustified disparity among codefendants could have salutary consequences beyond improving the fairness of the sentences at hand. It could lead to a richer and more honest discussion of the underlying purposes of sentences and how they are--or are not--served by the current structure of the Guidelines. Ultimately, the causes of unjustified sentencing disparity are best addressed through revision of the Guidelines themselves. In the meantime, though, departures can reduce such disparity and draw attention to the areas of the Guidelines that judges find especially problematic.

Id. at 2350 (footnotes omitted).

While many noted jurists, including several on this Court, have vigorously and forthrightly denounced the inherent unfairness of the Sentencing Guidelines and their application in many cases, perhaps no judicial opinion has been more damning of the Guidelines and their manipulation by the government than the blistering attack recently launched by Chief Judge William G. Young in *United States v. Green*, 2004 U.S. Dist. LEXIS 11292 (D. Mass.) (June 18, 2004). In his 133-page scholarly and insightful tour de force, bolstered with 415 footnotes, Judge Young takes no prisoners when exposing the flaws of the sentencing process:

> The Department today has the power -- and the incentive -- to ratchet punishment up or down solely at its discretion. It does so most often to burden a defendant's constitutional right to a jury trial and thus force a plea bargain. The result: In the District of Massachusetts, an individual who stands up to the

> Department and insists on a jury trial gets, upon conviction, a sentence *500 percent longer* than a similarly situated defendant who pleads guilty and cooperates.

Id. at *18. (emphasis added) (footnotes omitted). Indeed, Judge Young cites the instant case as a prime example of the problem:

> [C]harge bargaining coupled with prohibited fact bargaining drove the cruelly disparate sentences in *United States v. Thurston*, but the Court of Appeals again failed to detect it, focusing instead on the perceived inadequacies in the district court's sentencing rationale.

Id. at *42. (footnotes omitted)

For example, with respect to charge bargaining, Judge Young states:

> The pressure is placed upon the defendant by bringing a multi-count indictment and then trading away charges or counts more difficult to prove in return for a guilty plea to other counts or lesser charges. * * * True, Attorney General Ashcroft has recently forbidden Departmental charge bargaining in no uncertain terms. . . .
>
> * * * *
>
> But this appears to be sound and fury, signifying little. Charge bargaining continues in this District as before and Department attorneys seem to know little about the centralized permitting process Attorney General Ashcroft has implemented.

Id. at *25-*26 (footnotes omitted).

Similarly, Justice Anthony Kennedy noted in his impassioned plea last August before the American Bar Association:

> Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U.S. attorney, often not much older than the defendant, is misguided. . . . The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.[9]

With respect to fact bargaining, Judge Young was more searing in his attack on that practice than he was on charge bargaining:

> The most repugnant of the Department's tactics is to lie to the Court in order to induce a guilty plea. This

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[9] Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *portions reprinted in ABA Justice Kennedy Commission: Report to the House of Delegates* (June 2004), *available at* www.abanet.org/crimjust/kennedy/commutation.pdf. Accepting Justice Kennedy's challenge, the ABA established the Justice Kennedy Commission, chaired by noted criminal law professor Stephen A. Saltzburg, to review and make recommendations to the ABA House of Delegates regarding sentencing systems at the federal and state levels. The Commission issued its report on June 23, 2004, and its recommendations will be considered at ABA meeting Annual Meeting in Atlanta on August 9-10, 2004.

> is the process known as "fact bargaining." It occurs when a departmental attorney "swallows the drugs" or "the gun" as the case may be, i.e., fails to report to the probation officer in rendering its descriptions of offense conduct (and then later fails to bring to the attention of the Court) relevant evidence that may affect the guidelines calculation in order to reduce that calculation to secure a disposition to which it and defense counsel have agreed. This, of course, is flat-out illegal, and Attorney General Ashcroft has prohibited it in no uncertain terms. This Court is unaware of any instance where the Attorney General has disciplined a Department attorney for engaging in the practice.

Id. at *41.

Precisely because the Justice Department's abusive prosecutorial practices and manipulation of the Sentencing Guidelines unduly force over 97 percent of federal defendants to plead guilty rather than exercise their constitutional right to trial, and thereby forego appellate review of their sentences, this case presents the Court with a rare but perfect opportunity to provide much needed guidance to the judiciary on the proper application of the Guidelines by the trial court, appropriate disparity-based departure decisions, and the scope of appellate review of such departure decisions.

CONCLUSION

For the foregoing reasons and those presented by the Petitioner, the Court should grant the petition for writ of certiorari. At a minimum, the Court should direct the Acting Solicitor General to submit a response to the petition.

Respectfully submitted,

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